SUBJECT INDEX

	Page
Jurisdiction of the Court	1
The Defense set up by the Solicitor General	1-3
Point One	3
Statement and argument and authorities under Point One	4
Point Three	8
Statement	9
Argument and authorities under Point Three	9
Point Two	12
Statement and argument and authorities under Point Two	13
Point Five and Statement	14, 15
Argument and authorities	15
Point Six and statement and argument and authorities	16
CERTIFICATE OF SERVICE	19
Assignment of errors, Point I through 6	20

LIST OF AUTHORITIES CITED

	Page
Assignment of Errors	20
Britton v. Gardner, 270 F. Supp. 412	5, 6, 14, 17
Brown v. Gardner, 387 F. 2d 345	9, 11, 15, 16
Code of Federal Regulations, Title 20, page 454	6, 18
Conner v. Gardner, 381 F. 2d 497	9, 11, 15, 16
Carroll v. Celebrezze, 228 F. Supp. 340	9, 15
Gardner v. Menedez, 373 F. 2d 488	6, 9, 14, 15, 16, 17
McKittrick v. Gardner, 378 F. 2d 872	13, 17
Philpott v. Gardner, 403 F. 2d 774	9, 15
Ray v. Gardner, 387 F. 2d 162	5, 9, 14, 15, 16, 17
Robinson v. Gardner, 374 F. 2d 949	9, 15, 16
Sheppard v. Fleming, 189 F. Supp. 571	5
Statute 42 U. S. C. A. 406(a)	3, 7, 10, 17
Statute 42 U. S. C. A. 406(b)(1)	2, 3, 6, 8, 10, 14, 16, 17
Supreme Court Rule, 24, Section 4	1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

NO. 427

SIDNEY E. DAWSON,

Petitioner,

versus

ROBERT H. FINCH, Secretary of Health, Education and Welfare,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONER IN ANSWER TO THE MEMORANDUM FOR THE RESPONDENT IN OPPOSITION BY SOLICITOR GENERAL

Petitioner herein invokes Supreme Court Rule 24, Section 4; and states that he adopts the statement of the nature and result of the case as provided as shown in the Petition for a Writ of Certiorari, filed in this Court.

The defense as shown and set up by the Honorable Solicitor General herein, is among other things shown in paragraph 2 on page 2, as follows:

"2. The court of appeals correctly held that 42 U. S. C. 406(b) bars a court from granting an attorney's fee in social security disability cases where the Secretary has already awarded a fee of 25 per cent of the accrued benefits. That section (Pet. Supp. App. 6-7) permits a district court, upon rendering a judgment in favor of a claimant, to allow an attorney's fees "not in excess of 25 per cent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment," and authorizes the Secretary to pay that fee directly to the attorney out of the accrued benefits. The legislative history the court of appeals cited indicates that Congress intended to preclude the charging of "inordinately large fees" in social security cases — . It would violate this policy for the court to award petitioner a fee in addition to the 25 per cent given by the Secretary".

Petitioner says in answer to same, the trial court, the Secretary, neither the Honorable Circuit Court of Appeals for the Fifth Circuit has cited a single case holding that 42 U. S. C. A. 406(b) bars a court from granting an attorney's fee in social security disability case where the Secretary has already awarded a fee of 25 per cent of the accrued benefits; nor has Congress passed a law holding or providing for the same. If that is the law, it appears that Congress would provide the same by statute.

Congress has tried together with the Secretary to take care of this situation by passing two inde-

pendent statutes. One statute, 42 U. S. C. A. 406(b) (1), provides:

> "Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its *judgment a reasonable fee for such representation, not in excess of 25 per cent of the total of the past due benefits* to which the claimant is entitled by reason of such judgment —.

The other Statute, 42 U. S. C. A. 406(a) provides as follows:

> The attorney who represents the claimant before the Social Security Administration and it is shown that he secured substantial gains for the claimant, he must show his fee to be reasonable, and is limited to not in excess of 25 per cent of the accrued benefits coming to the claimant as his fee. — .

In the petition for rehearing, Petitioner set up the following Point.

POINT 1 (RESTATED)

> The court erred in holding that the Social Security Administration had authority and jurisdiction to determine the fee for an attorney in a case in the U. S. District Court, based upon a

judgment or a remand since the amendment of 1965.

Statement.

The trial Court and the Appellate Court dismissed the case at bar on the ground that the petitioner had received 25 per cent of the accrued benefits coming to the claimant in the Social Security Administration for his fee and that was all that he could get as an attorney for representing the claimant in the administrative proceedings and that he could not get anything for representing the claimant in the U. S. District Court even where substantial gains accrued to the claimant and dismissed the same for want of jurisdiction.

Argument and Authorities.

It is shown here both of said courts refused to take jurisdiction of this case under 42 U. S. C. A. 406(b)(1) where petitioner secured a remand for the claimant; but instead assumed the cause of action that had been awarded in the administration proceedings, and not by any judicial proceedings.

The Social Security Administration has sole jurisdiction to determine and evaluate the services of an attorney's fee rendered the claimant in the administrative proceedings; and likewise the Court has sole jurisdiction to evaluate the services rendered by an attorney for the claimant in a judicial proceeding and to set his fee thereby. The courts hold the jurisdiction of the Secretary is as follows:

"Under this section providing that secretary may prescribe maximum fees which may be charged for services performed in connection with any claim before the Secretary, he has sole jurisdiction to pass on an amount of fees charged by attorneys for services rendered in the Administration proceedings before the Secretary, but he does not have jurisdiction to fix fees which may be charged by an attorney for representing his client in a judicial proceeding to review a decision of the Secretary" Sheppard v. Fleming, 189 F. Supp. 571; Ray v. Gardner, 387 F. 2d 162. 1967 4th Cir.; Britton v. Gardner, 270 F. Supp. 412.

Ray v. Gardner, 387 F. 2d 162 holds: "Court had no jurisdiction to make an award of a fee for services in the administrative proceedings.

"For that reason, the case will be remanded to the District Court with leave to counsel, if he so advised, to apply to the Administrator for an allowance of a reasonable fee for services rendered in the administrative proceedings and to the District Court for a reasonable fee for services rendered in that Court". Each forum is supreme within its own sphere of action, and neither can usurp the jurisdiction of the other.

It appears that if the United States District Court had taken jurisdiction of this cause of action as set

up in petitioner's First Supplementary Petition, showing a reasonable fee should be granted on page 19 of the Appendix in the appellate court, quoting the statute under 42 U. S. C. A. 406 (b) (1), wherein the court could have granted petitioner a reasonable fee in any amount not in excess of 25 per cent of the accrued benefits coming to the claimant; because it is held if any proceedings held by a representative before any State or Federal Court shall not be considered services in any proceeding before the Social Security Administration for the purposes of setting a reasonable fee, which shows said provisions in Code of Federal Regulations, Title 20, Chapter 111, page 454, as follows:

> "Section 404.074 (a) Representation of claimant in court proceeding. Any service rendered by any representative in any proceeding before any State or Federal Court shall not be considered services in any proceeding before the Social Security Administration for purposes of (setting a reasonable attorney's fee), citing Britton v. Gardner, 270 F. Supp. 412." Under this law if the court had granted petitioner a reasonable attorney's fee Secretary would have no defense to it.

In the case of Gardner v. Menedez, 373 F. 2d 488, 1967, First Circuit, holding:

> "That a court is the appropriate one to determine the value of the services rendered before it, and by implication, it is not for the court to

determine the value of service rendered elsewhere.

"For the services performed before the agency, the Secretary may award appropriate counsel fees. 42 U. S. C. A. 406(a).

"Section 206(b) (1) does not expressly revoke this provision. On the contrary, we see no point in considering it revoked pro tanto by implication. On the contrary, we see every reason for continuing the principle that the agency before whom service was rendered should be the one to determine their value."

In addition, the Solicitor General as quoted above, further says in the latter part of paragraph 2, page 2, "That section (pet. Supp. App. 6-7) permits a district court upon rendering a judgment in favor of claimant, to allow an attorney's fee 'not in excess of 25 per cent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment', and authorizes the Secretary to pay that fee directly to the attorney out of the accrued benefits". Petitioner says this is true, and *courts construe a remand the same as a judgment.*

The Secretary's Defense In The Courts

When the petitioner herein filed his complaint and said Supplementary Petition in the trial court asking the court to set him a reasonable fee for the services performed before the court on a remand under statute

42 U. S. C. A. 406(b) (1), the Secretary filed a motion to dismiss on the following ground:

On page 2 of said motion, Tr. 2, 3, it alleges

> "for any attorney, representing a claimant before a court to obtain allowance of a fee from the court for his services in the court must have entered a 'judgment favorable' to the claimant the attorney represented and if such a judgment obtained the court then could award him a fee not in excess of 25 per cent of past due benefits payable to the claimant under the court's judgment".

And on page 3 of such motion Tr. 2, 3 to dismiss, further states:

> "No award was made by the court and since this is so, no award of a fee could be made by the court to the attorney pursuant to section 206(d) of the Social Security Act."

In addition to the above and foregoing, the Secretary set up the fact that since the petitioner had already received 25 per cent of the accrued benefits coming to the claimant in the administration, the same should be dismissed; and the same was dismissed on the ground that petitioner could not get any more.

POINT 3 (RESTATED)

Counsel has a right to recover a reasonable fee on remand for services to his client, al-

though a judgment was not obtained on the merits, and the opinion of the court is in conflict with the law.

Statement

And it appears also that the defense of the Secretary sets up the fact as shown above that since the court did not render a "judgment favorable" to claimant, is not able to receive anything under the law, but this is a mistake and an error, for the courts hold that where the claimant secures an order from them on remand, it is the same as and equivalent to and synonymous to a "judgment," and the attorney and claimant have the same rights to recover on the remand for all their benefits the same as a judgment, which is shown by the following cases, which hold:

Argument and Authorities.

"Court could award an attorney's fee for substantial work done before the court, although court entered no judgment for specific benefits for alleged disability, but instead, ordered a remand to Secretary of Health, Education and Welfare who ultimately honored the claim for disability benefits". Conner v. Gardner, 381 F. 2d 497, 4th Cir. (1967); Robinson v. Gardner, 374 F. 2d 949, 1967, 4th Cir.; Ray v. Gardner, 387 F. 2d 162, 1967, 4th Cir.; Gardner v. Menedez, 373 F. 2d 488, 1st Circuit, 1967; Carroll v. Celebrezze, 228 F. Supp. 340; Brown v. Gardner, 387 F. 2d 345, 1967, 4th Circuit; Philpott v.

Gardner, 403 F. 2d 774, 1968, Sixth Circuit. By further investigation other cases could be added to this number.

And the said Solicitor General, in said paragraph two, near the bottom of said paragraph and in the Court's opinion on page 8 (Pet. Supp. App.) which shows, "the legislative history — indicate that Congress intended to preclude the charging of 'inordinately large fees' in social security cases — . It would violate this policy for the court to award petitioner a fee in addition to the 25 per cent given by the Secretary".

In answer to same, petitioner says it all depends upon the accrued benefits coming to the claimant, if claimant has a very large amount coming to him of course 25 per cent of the accrued benefits would be too much and exorbitant and unreasonable. On the other hand in case of a small amount coming to the claimant as accrued benefits, it might be that 25 per cent would be enough coming to the claimant as accrued benefits, which amount could be awarded to the attorney for a reasonable fee. It is up to the administrative proceedings to see that the attorney gets a reasonable fee under 42 U. S. C. A. 406(a) and the courts should be the safeguard to see that the attorney gets a reasonable fee under 42 U. S. C. A. 406(b) (1), and in view of this, it appears that Congress was wise in passing two distinct jurisdictions to deal out justice and equity to all. Each forum should see that attorney receives a reasonable fee for his services rendered his client, and exhorbitant fees should not be given and held void. For an example,

In Conner v. Gardner, 381 F. 2d 497, 1967, 4th Cir. the Social Security Administration awarded the attorney $1,000.00 as a reasonable fee, and the Court found that his fee should be $844.16, making in all the sum of $1,844.16, which amounted to about 20 percent of the total benefits coming to him. Now subtract $625.58 that petitioner received from the administration proceedings as 25 percent due him and we have $1218.58 which was received more than the petitioner. And that if the Court had entertained and given him jurisdiction on the work he did in the District Court under said statute on a reasonable fee not in excess of 25 per cent of the accrued benefits coming to the claimant, say that he could give him any amount under that, but say that he gave him the limit which would be another 25 percent, making in all $1251.16 that much from the said $1844.16 which would be $593.00 more than the petitioner received from both forums.

In Brown v. Gardner, 5th Cir. 1967, 387 F. 2d 345, it is found the sum of $16,833.60 was the accrued benefits coming to the claimant. The Secretary paid the attorney as a fee $1487.90 and the Court allowed him the sum $1389.17, making in all from both forums the sum of $2,877.17, which shows the attorney was paid a little more than 20 percent. Take $625.58 the sum that petitioner received in the Administration proceedings and we have $2,252.01 more than the petitioner received. It takes almost as much work to get a small case through the administration proceedings and court and processed as a large one. If in 2 forums he got 1/4 each that makes $1251.16 that from $2,877.17 makes $1626.01 more than petitioner.

Since the trial court and the appellate court says that petitioner received $625.16 being 25 per cent of the accrued benefits coming to the claimant in the Social Security Administration, which is too much money, and that petitioner should not receive a thing for his work under said statute in the district court, and was dismissed with prejudice for lack of jurisdiction, under the statute of July 30, 1965.

Substantial gains have accrued to the claimant since he has received his benefits, and now his benefits have been raised and he is getting approximately $175.00 per month, and will ordinarily receive the same until he dies. Petitioner began representing the claimant in 1966 and still in court. Petitioner has taken this case through three trials, 4 appeals and still in court, and has spent lots of time and expense trying to settle the same and get my fee set. If it had not been for an attorney the claimant would not have received anything. In addition, petitioner had advanced claimant $52.50 for medical services and reports to Albert Hindler, M.D., and $65.00 to John Stack, M.D. for the same and testifying, and $4.00 for Marshall service, all being $121.50 without expecting anything back.

POINT 2 (RESTATED

The court erred in failing and refusing to hold that when an attorney has tried a case in two forums he has a right to look to each forum for the aliquot part of his total fee. (Supp. App. 14)

Statement

After the said administrative proceedings set petitioner's fee in the said sum of $625.58 being 25 per cent of the accrued benefits coming to the claimant, the petitioner petitioned the United States District Court to set his fee for the services rendered the claimant in the said court under said statute, asking for a reasonable fee, not in excess of 25 percent of the accrued benefits coming to claimant.

Argument and Authorities

It is also understood that the claimant and petitioner herein entered into a contingent fee contract, and if reasonable it should be approved. In the case of McKittrick v. Gardner, 378 F. 2d 872 shows that a contingent fee contract within the law and reasonable should be upheld; and that there is no prohibition against his consideration of the contingency of compensation; and availability of lawyers to such claimants is of the *highest importance*, and holds:

> "While the judge must approve the reasonableness of the fee in every case and not unquestionably endorse contingent fee contracts providing for a fee of not more than 25 per cent of the accrued benefits, there is no prohibition against his consideration of compensation. Availability of lawyers to such claimants is of highest importance, and if a lawyer is to receive no compensation is contingent on whether or not he has a contract that says so.

This said court further held, that the law was intended for an attorney to get a part of his fee from each forum; and in the same opinion and decision the court held that when a counsel appears in two forums for the claimant he should ask each for the aliquot part of his total fee, to quote the exact words of the court are as follows.

> "In Menedez (case) there is nothing singular in the fact that counsel who appears in two forums should apply to each for the aliquot part of his total fee".

In Gardner v. Menedez, 373 F. 2d 488, 1967, First Circuit, not only holds the above quotation, but further holds:

> "In reading the statute, it is requiring *the Court in every case* to fix and determine a reasonable fee for services rendered in Court".

To the same effect is the holding of Ray v. Gardner, 387 F. 2d 162 as heretofore shown. In Britton v. Gardner, 270 F. Supp. 412, holding with the McKittrick in stating:

> "There is nothing singular in the fact that counsel who appears in two forums should apply to each for the aliquot part of his total fee."

POINT 5 (RESTATED)

The court erred in holding that the District Court under the Statute 42 U. S. C. A. 406(b) (1) never had

jurisdiction to set counsel a fee for representing his client in the District Court on a remand whereby the Court could evaluate his services, which opinion of the Court makes said Statute inoperative, and in conflict with said cases set up in Plaintiff-Appellant's brief holding that the District Court had jurisdiction on remand could award attorney's fee despite the fact that it did not render a judgment for benefits.

Statement

The cases set out above together with their circuits showing that claimant and petitioner could recover on a remand the same as a judgment of the court, are in direct conflict with the opinion of the court herein where the court held that it did not have jurisdiction and dismissed petitioner's complaint and cause of action and shows that said statute becomes in effect inoperative and void.

Argument and Authorities

We have already produced these authorities on page 9 herein, and in the way of summary we will produce them again in short as follows:

Conner v. Gardner, 381 F. 2d 497, 4th Cir. 1967; Robinson v. Gardner, 374 F. 2d 949, 4th Cir. 1967; Ray v. Gardner, 387 F. 2d 162, 1967, 4th Cir.; Gardner v. Menedez, 373 F. 2d 488, 1st Cir. 1967; Carroll v. Celebrezze, 228 F. Supp. 340; Brown v. Gardner, 387 F. 2d 345, 1967, 4th Circuit; Philpott v. Gardner, 403 F. 2d 774, 1968, 6th Circuit. In view of the above and foregoing,

we have Conner v. Gardner, Robinson v. Gardner, Ray v. Gardner, Brown v. Gardner, all four, and Gardner v. Menedez of 1st Circuit, and Philpott of the 6th Circuit, all holding that a remand equivalent to and same as a judgment of the Court.

POINT 6 (RESTATED)

The Court erred in holding that the District Court under the statute 42 U. S. C. A. 406(b) (1) never had jurisdiction to set counsel a fee for representing his client in the District Court on a remand wherein the Court could evaluate his services, which opinion of the Court makes said Statute inoperative, and in conflict with said cases set out in Plaintiff-Appellant's brief, holding that where counsel who appears in two forums should apply to each for the aliquot part of his total fee.

Statement

The cases set out above together with their circuits showing that claimant and petitioner could recover on a remand the same as a judgment of the court, are in direct conflict with the opinion of the court herein where the court held that it did not have jurisdiction, which opinion of the Court makes said Statute inoperative and void, and in conflict with said cases set out above, holding that where counsel who appears in two forums should apply to each for the aliquot part of his total fee.

Argument and Authorities

The cases set out above together with their circuits showing that claimant and petitioner could recover on a remand the same as the judgment of the court, holding that where counsel who appears in two forums should apply to each for the aliquot part of their total fee, in the way of a summary are as follows: Gardner v. Menedez, 373 F. 2d 488, 1967, First Circuit; Britton v. Gardner, 270 F. Supp. 412; McKittrick v. Gardner, 378 F. 2d 872, 1967, 4th Circuit; and the case of Ray v. Gardner, 387 F. 2d 162, 1967, 4th Circuit, holding about the same.

The Court held on the last page of the opinion, being page 12 (Sup. App.) that since Dawson received 25 per cent of the past due benefits coming to the claimant he should receive no more, which was paid in the administration proceedings, being 42 U. S. C. A. 406(a) providing among other things that an attorney representing the claimant in the administration is limited to not in excess of 25 per cent of the past due benefits coming to the claimant as his fee; and if the attorney represents the claimant in a judicial proceeding under said 406(b) (1) he is limited to not in excess of 25 per cent of the accrued benefits coming to the claimant as his fee; Court holding petitioner can not receive anything for his services performed in said 406(b) (1) in the District Court; by analogy and implication holds said statute void and inoperative.

And by further analogy and implication, if an attorney first receives his 25 percent fee in the District Court, he is precluded from receiving anything for rep-

resenting his client in the administration proceedings, which in effect holds said statute void and inoperative.

And in addition, it is held if any proceedings held by a representative before any State or Federal Court shall not be considered services in any proceeding before the Social Security Administration for the purposes of setting a reasonable attorney's fee, which shows said provisions in Code of Federal Regulations, Title 20, Chapter 111, page 454, as heretofore shown. Under this provision petitioner could have been granted a reasonable attorney's fee under said statute in the District Court, and could not be considered by the Social Security Administration for the purposes of (setting a reasonable attorney's fee.) This provision of said Code is also held by implication and analogy to be inoperative and of no effect by the decision of said court.

Wherefore petitioner prays that upon the due consideration of the reply brief and record herein that the petition for Writ of Certiorari be granted; and that if said writ be granted and upon the further consideration of said brief and record by the Court, the petitioner humbly prays that said decisions of said courts be reversed, and that a reasonable attorney's fee be set for the petitioner herein.

Respectfully submitted,

Sidney E. Dawson, Petitioner,
6918 Lindsley Ave.
Dallas, Texas 75223,
Tel. DA 1-3522

CERTIFICATE OF SERVICE

I, Sidney E. Dawson, Attorney for Petitioner in the above entitled cause, hereby certify that on the ____ day of September, 1970, I served the attached brief upon Miss Kathryn Baldwin, Respondent, Washington, D. C., and Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530. All parties required to be served have been served, Rule 33, Sec. 3.

T. L. Dawson, Attorney At Law
and a Member of the Bar of
this Court
4328 Underwood St.
University Park, Maryland
Son of Petitioner

By _____
Sidney E. Dawson

ASSIGNMENT OF ERRORS

(Points 1-6)

In the petition for a rehearing IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, the petitioner herein set up the following errors:

Point 1

The Court erred in holding that the Social Security Administration had authority and jurisdiction to determine the fee for an attorney in a case in the U. S. District Court, based upon a judgment or remand, since the Amendment of 1965 to the Act.

Point 2

The Court erred in failing and refusing to hold that when an attorney has tried a case in two forums he has a right to look to each forum for the aliquot part of his total fee.

Point 3

The opinion of the Honorable Court is in conflict with the law holding that counsel has the right to recover a reasonable fee on remand for services to his client, although a judgment was not obtained on the merits of the case.

Point 4

The ruling in the present case is in direct conflict with the decisions of other Courts in similar situations.

Point 5

The Court erred in holding that the District Court under the Statute 42 U. S. C. A. 406(b) (1) never had jurisdiction to set counsel a fee for representing his client in the District Court on a remand whereby the Court could evaluate his services, which opinion of the Court makes said Statute inoperative, and in conflict with the said cases set up in Plaintiff-Appellant's brief holding that the District Court had jurisdiction on remand could award attorney's fee despite the fact that it did not render a judgment for benefits.

Point 6

The Court erred in holding that the District Court under the Statute 42 U. S. C. A. 406(b) (1) never had jurisdiction to set counsel a fee for representing his client in the District Court on a remand wherein the Court could evaluate his services, which opinion of the Court makes said Statute inoperative, and in conflict with said cases set out in Plaintiff-Appellant's brief, holding that where counsel who appears in two forums should apply to each for the aliquot part of his total fee.